Filed 1/25/19 P. v. Littlejohn CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. WILLIAM LITTLEJOHN, Defendant and Appellant.	B284087 (Los Angeles County Super. Ct. No. TA139591)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael Abzug, Judge. Affirmed with modifications.

Caneel C. Fraser, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney

General, and David E. Madeo, Deputy Attorney General, for Plaintiff and Respondent.

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Several weeks after William Littlejohn (defendant) and his girlfriend broke up, he approached her at a recycling center, put a gun in her face, told her, "Bitch, I've got you," and then pistol whipped her. Defendant then drew the same gun at police trying to stop him for questioning a few days later. A jury convicted him of several crimes related to each incident, and the court sentenced him to 20 years in prison. On appeal, defendant raises one evidentiary issue, several sentencing issues and asks us to review the transcript from the *in camera Pitchess*[1] hearing. None of these arguments calls into question the validity of defendant's convictions, but the trial court did commit several sentencing errors. Accordingly, we affirm defendant's convictions but modify his sentence.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

A. *March 9 incident*

Defendant and Jamika Jones (Jones) had a sexual relationship until they broke up in late February 2016. Soon thereafter, defendant began to send her text messages in which he demanded that she return a backpack full of belongings he had left with her and threatened, "I'm gonna kill you." Other people also told Jones that she better "watch [her] back" because defendant was upset with her.

On March 9, 2016, defendant found Jones at the recycling center where she often hung out. She walked into a room-sized recycling bin, and defendant followed. Once inside, defendant

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1 *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

lifted a gun to her face, said, "Bitch, I got you now" and struck her in the face with the gun.

One of Jones's friends, Lawrence Coleman (Coleman) was also inside the recycling bin at the time defendant assaulted Jones. Coleman saw defendant strike Jones with the gun, but gave inconsistent accounts about whether defendant then pointed the gun at him.

Jones reported the incident to the Los Angeles Police Department (LAPD) later that day.

B. *March 15 incident*

On March 15, 2016, three LAPD officers in a patrol car spotted defendant riding a bicycle; they recognized him as the suspect from the previously reported assault on Jones. The officers called out to defendant to "stop," but he kept riding. As they continued following him in their car, defendant reached into his waistband, pulled out a silver-colored gun, and then tucked it away again as he continued riding away. At some point, defendant got off the bicycle, retrieved the gun from his waistband and began raising it up to take aim at the patrol car. The officer driving the car made the conscious decision to strike defendant with the car's front bumper. The impact knocked defendant over and knocked the gun from his hand.

Jones recognized the gun as the one defendant had used on her a few days earlier.

II. Procedural Background

The People charged defendant with crimes related to each incident. Regarding the March 9 incident, the People charged defendant with (1) assaulting Jones and Coleman with a firearm

(Pen. Code, § 245, subd. (a)(2))[2] (counts 1 and 6), (2) injuring a spouse or cohabitant (§ 273.5, subd. (a)) (count 2), and (3) making criminal threats (§ 422, subd. (a)) (count 3). Regarding the March 15 incident, the People charged defendant with (1) assaulting peace officers with a semi-automatic firearm (§ 245, subd. (d)(2)) (count 4) and (2) being a felon in possession (§ 29800, subd. (a)(1)) (count 5). As to the assault with a firearm and criminal threats counts, the People alleged that defendant personally used a firearm (§ 12022.5, subd. (a)). The People further alleged that defendant had served five prior prison terms (§ 667.5, subd. (b)).

The matter proceeded to trial by jury. The trial court instructed the jury on all of the charged offenses as well as all pertinent lesser included offenses. The jury found defendant guilty of the charged crimes of assaulting Jones with a firearm (count 1), making criminal threats (count 3), and being a felon in possession (count 5). The jury found the allegation true that defendant personally used a firearm while assaulting Jones and making criminal threats. The jury found defendant guilty of the lesser included offense of battery during a dating relationship (§ 243, subd. (e)(1)) (rather than injuring a spouse or cohabitant), and of the lesser included misdemeanor offense of assaulting a peace officer (§§ 240, 241) (rather than assaulting a peace officer with a semi-automatic firearm). The jury hung on whether defendant assaulted Coleman with a firearm.

The trial court sentenced defendant to state prison for 20 years. The court imposed a 17-year sentence for assaulting Jones with a firearm, comprised of a high-end base term of four years,

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[2] All further statutory references are to the Penal Code unless otherwise indicated.

plus a high-end term of 10 years for personal use of a firearm, plus three one-year terms for serving prior prison sentences. The court then imposed a consecutive two-year sentence for making criminal threats, comprised of a base sentence of 8 months (calculated as one third of the midterm sentence of 24 months) plus 16 months for personal use of a firearm (calculated as one-third the midterm enhancement of four years). The court next imposed consecutive sentences of four months on the assaulting a peace officer count and eight months on the felon in possession count. The court imposed a concurrent 180-day jail sentence on the cohabitant battery count.

Defendant filed this timely appeal.

DISCUSSION

I. Evidentiary Error

Defendant argues that the trial court erred in admitting two categories of evidence: (1) Jones's testimony that several people told her, prior to the March 9 incident, that defendant was upset with her and that she "better watch her back"; and (2) Jones's testimony that one person told her, four days *after* the March 9 incident, that defendant was carrying a machete and said he was not "done with [Jones]" and "was gonna use the machete on [Jones's] son." The trial court admitted these statements for the "limited purpose of showing [Jones's] state of mind" "at the time she [allegedly] heard . . . defendant ma[ke] threat[ening] remarks directly to her." We review this evidentiary ruling for an abuse of discretion. (*People v. Clark* (2016) 63 Cal.4th 522, 597.)

Defendant argues that the trial court abused its discretion in admitting this evidence because the acts underlying each category are "uncharged threats" that should have been excluded

as impermissible propensity evidence under Evidence Code section 1101, subdivision (a) or as more prejudicial than probative under Evidence Code section 352. We examine each category of evidence separately.

A. *Pre-incident statements*

The trial court did not abuse its discretion in admitting evidence that other people told Jones, prior to the March 9 incident, that defendant was upset with her. Because the trial court instructed the jury to consider this evidence only for the purpose of proving Jones's state of mind when she heard the March 9 threat and because we presume the jury heeded this instruction, *People v. Bryant* (2014) 60 Cal.4th 335, 447-448, this evidence was not admitted to prove defendant's propensity but instead "to prove some fact . . . other than his . . . disposition" under Evidence Code section 1101, subdivision (b).

Whether evidence of other crimes is properly admitted under Evidence Code section 1101, subdivision (b) turns on (1) whether the fact to be proven by the other crimes is at issue, (2) the extent to which the other crimes tend to prove that fact, and (3) whether countervailing policy concerns, such as those embodied in Evidence Code section 352, nevertheless militate against admitting the other crimes. (*People v. Lindberg* (2008) 45 Cal.4th 1, 22.) The statements to Jones that defendant was upset with her and "better watch her back" prior to March 9 tends to prove that Jones was in sustained fear when defendant later threatened her on March 9 by saying, "Bitch, I got you now" while pointing a gun at her head. (*People v. Ogle* (2010) 185 Cal.App.4th 1138, 1143 [other crimes may be used to prove sustained fear]; *People v. Garrett* (1994) 30 Cal.App.4th 962, 966-967 [same].) Sustained fear is at issue because it is an element of

the crime of criminal threats charged against defendant for the March 9 incident. (§ 422.) And given this substantial probative value, admission of these statements was not "substantially outweighed" by the "substantial danger of undue prejudice" to defendant. (Evid. Code, § 352.)

Defendant raises three arguments in response. First, he suggests that the statements attributed to him by the third parties have limited probative value because they involve two layers of hearsay (that is, his statements to the third parties, and the third parties' repeating of those statements to Jones), and that the third parties' statements to Jones attributing the threats *to defendant* (the second layer) were not admitted for their truth and thus cannot be tied back to defendant. The unspoken premise of this argument is that a victim's sustained fear may only originate from acts or statements made by the defendant who is charged with making criminal threats (rather than from the statements of third parties). But this premise is false. (*People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1342 (*Mendoza*), superseded on other grounds, § 422.) Second, defendant contends that the third parties' statements warning Jones about him were cumulative of the threats he made to Jones in text messages. They were not: The aggregate effect of the text messages *and* the statements made by the third parties made Jones's sustained fear all the more reasonable. (§ 422.) Lastly, defendant asserts that the trial court did not engage in a "careful weighing process" of probative value against prejudicial effect. However, a trial court need not expressly weigh these considerations on the record as long as we may infer that the court did so (*People v. Prince* (2007) 40 Cal.4th 1179, 1237); here, we may so infer because the

court made its ruling after defendant specifically asked the court to engage in such weighing.

B. *Post-incident statement*

We conclude that the trial court may have abused its discretion in allowing Jones to testify that a friend told her, four days *after* the March 9 incident, that defendant was carrying a machete and threatening to use it on Jones and her son. Although a victim's sustained fear can sometimes be proven by acts that occur *after* a criminal threat is made (*Mendoza*, *supra*, 59 Cal.App.4th at pp. 1341-1342 [acts of intimidation occurring 30 minutes after threat contribute to sustained fear]), here the acts occurred *days* after defendant made his March 9, in-person threat and thus shed little or no light on what Jones was thinking at the time of the charged threat four days earlier.

We nevertheless conclude that the error was harmless, whether we treat the error as one of state law or of federal constitutional dimension, because the admission of the post-incident statement by the third party was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) The trial court instructed the jury to consider the statement for the limited purpose of showing Jones's state of mind—that is, her sustained fear. As noted above, we presume the jury heeded this instruction. But even if we agreed with defendant that this is one of those rare instances where a jury might disregard the limiting instruction and consider the statement as evidence of defendant's predisposition, its admission was still harmless because (1) the jury's threat verdict unanimously rested on the March 9 threat (because the jury found defendant personally used a firearm during the offense and only the March 9 threat involved his use of a firearm, and because the jury was required

to unanimously agree on which threat underlies this count), and (2) the evidence supporting the March 9 threat was overwhelming (based on Jones's in-court testimony and Coleman's contemporaneous statements to law enforcement.

II. Sentencing Errors

A. *Section 654*

Defendant argues that the trial court erred in running the criminal threats sentence consecutive to, and the injuring a spouse sentence concurrently with, the assault with a firearm sentence. Defendant asserts that section 654 required the court to stay the criminal threats and injuring a spouse sentences. Defendant is correct.

Section 654 prohibits a court from "punish[ing] "[a]n act or omission"—or a "course of criminal conduct"—"under more than one provision." (§ 654, subd. (a); *People v. Capistrano* (2014) 59 Cal.4th 830, 885.) ""Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one."" (*Ibid.*, quoting *People v. Rodriguez* (2009) 47 Cal.4th 501, 507; *People v. Beamon* (1973) 8 Cal.3d 625, 639-640.) The trial court in this case did not address the section 654 issue, but explained that it was running the criminal threats count consecutive to the assault with a firearm count because "the crimes and their objectives were predominantly independent, involve[ing] separate act[s] of threats and violence." We review the court's "implicit finding that section 654 does not apply . . . [for] substantial evidence." (*People v. Rodriguez* (2015) 235 Cal.App.4th 1000, 1005.)

Substantial evidence did not support the trial court's finding that defendant's acts of assaulting Jones and threatening her involved separate acts or that defendant acted with a distinct intent or objective. Although the People presented evidence of several different threats by defendant to Jones, we know from the jury's finding that defendant personally used a firearm that the threat underlying its criminal threats verdict was the threat on March 9 because that was the only threat involving a firearm. (See *People v. Siko* (1988) 45 Cal.3d 820, 826 [court must heed jury's findings when engaged in section 654 analysis].) That threat—"Bitch, I got you now"—was made while defendant held a gun to Jones's face and just moments before he struck her with that gun. The assault with a firearm was part and parcel of the threat and the threat was part and parcel of the assault. (Cf. *People v. Leonard* (2014) 228 Cal.App.4th 465, 499 [654 does not apply when assault and threats occur at distinct times].) For the same reasons (and, indeed, as the People concede), the injury to a spouse count was also part and parcel of the assault and threat. Accordingly, counts 2 and 3 should be stayed under section 654.

B. Remand Under Senate Bill 620

Defendant contends that he is entitled to a remand for the trial court to consider whether to strike the personal use of a firearm enhancement. Among other things, Senate Bill 620 amended section 12022.5 to grant trial courts the discretion to strike enhancements for the personal use of a firearm. (§ 12022.5, subd. (c); Sen. Bill No. 620 (2017-2018 Sess.), Stats. 2017, ch. 682, § 1.) Because this law grants a trial court the discretion to mitigate or reduce a criminal sentence, it applies retroactively to all nonfinal convictions unless the Legislature has expressed a contrary intent. (*People v. Francis* (1969) 71

Cal.2d 66, 75-78; *In re Estrada* (1965) 63 Cal.2d 740, 744-745.) Our Legislature expressed no such intent with Senate Bill 620. Accordingly, defendant is entitled to the benefit of Senate Bill 620 and thus is entitled to a remand to allow the trial court to exercise its newfound discretion unless the court, during the original sentencing, "clearly indicated . . . that it would not . . . have stricken" the personal use allegation if it had been aware of its discretion to do so. (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425.) Here, the court so indicated. At the time of sentencing, the court had the choice of imposing a sentence of 3 years, 4 years or 10 years for the personal use enhancement; the court chose 10 years. This constitutes a clear indication that the court would not have stricken the enhancement in order to impose *zero* years.

C. Prior Prison Terms

Defendant argues that the trial court erred in imposing separate one-year enhancements for serving a prior prison term for his 2013 conviction in Case No. TA126296 and his 2014 conviction in Case No. TA135625 because he was sentenced to a prison term in both cases at the same time. The People agree with defendant, and so do we. Section 667.5, subdivision (b) provides for a separate one-year sentencing enhancement for each new "felony" "sentence of imprisonment" that is "imposed." (§ 667.5, subd. (b).) Where, as here, a defendant *sustains* two convictions on different dates but the prison sentences on those convictions are imposed at the same time, only one "sentence of imprisonment" has been "imposed" within the meaning of section 667.5, subdivision (b). (*People v. Cardenas* (1987) 192 Cal.App.3d 51, 55.) Accordingly, one of the enhancements under section 667.5, subdivision (b) must be stricken.

III. *Pitchess* Review

Defendant also asks us to examine whether the trial court properly conducted its *in camera Pitchess* hearing. Where, as here, the trial court finds good cause to examine a law enforcement officer's personnel file for potentially discoverable information, the court must conduct an *in camera* hearing at which it examines the file and must "make a record of what documents it examined before ruling on the *Pitchess* motion." (*People v. Mooc* (2001) 26 Cal.4th 1216, 1229.) The court's ruling will be upheld absent an abuse of discretion. (*Id.* at p. 1228.) Here, the trial court found good cause to examine five officers' records (all five for dishonesty and fabrication of evidence, and three for the use of excessive force) and ordered disclosure as to some of those records. We have independently reviewed the sealed reporter's transcript of the *in camera* hearing, and conclude that the trial court properly exercised its discretion and that no other personnel records of the five officers at issue were subject to disclosure.

DISPOSITION

The judgment is modified: (1) to strike one of the three one-year enhancements for prior prison terms (§ 667.5, subd. (b)) and to reflect defendant has suffered two (rather than three) prior prison terms; (2) to stay imposition of the two-year consecutive sentence for criminal threats (count 3); and (3) to stay imposition of the concurrent 180-day sentence for misdemeanor cohabitant battery (count 2). The clerk of the superior court is directed to prepare an amended abstract of judgment and to forward a copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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_____, J.
HOFFSTADT

We concur:

_____, P. J.
LUI

_____, J.
CHAVEZ